dicial powers, and to usurp the powers confided by the constitution to the courts —to say nothing of the violation of the rights of personal security and private property therein involved—makes the principal case a salutary one. Without expressing any opinion as to the merits of the particular point in controversy, it is enough to know that the act in question is a violation of the right to personal security, and confuses the distinctions made by the constitution between legislative and judicial authority. It is clear that the act contemplates that the court should either be the mere executor of the commissioners' will or should exercise advisory functions in an administrative or political proceeding, or in the exercise of judicial power. Clearly the former duty cannot be imposed upon the court, and the latter only in cases enumerated in the constitution. As stated by the court, "The federal courts, under the constitution, cannot be made aids to any investigation by commission or committee, into the affairs of any one. If rights are to be protected or wrongs redressed by any investigation, it must be conducted by regular proceedings in courts of justice in cases authorized by the constitution." The remedy for the wrong sought to be redressed by Congress in the act in question, must, under the constitution, be sought in the regular way, by appeal to a court of competent jurisdiction, proceeding according to the course of the common law or of chancery.

The cases of *Stockdale* v. *Hanssard*, 9 Ad. & El. 1; *Kilbourn* v. *Thompson*, 103 U. S. 168; *Boyd* v. *The United States*, 116 Id. 616; *Lloyd* v. *Wayne Circuit Judge*, 24 Am. L. Reg. (N. S.) 790; and the reasoning of the court in the principal case, would seem, to the mind of an impartial reader, entirely conclusive upon the question in issue; and it is to be hoped that they will prove a warning to future legislatures that the distinctions between judicial and legislative power cannot be broken down at will, and the constitutional rights of the citizen infringed with impunity.

M. D. EWELL.

Chicago.

Supreme Court of Montana.

KELLEY v. CABLE CO.

Where, on the trial of an action brought by an employee against his employer for damages for personal injuries, the only instruction given on the question of ordinary care and reasonable care or diligence was one asked for by the plaintiff, he cannot be heard to complain on appeal that the jury were not sufficiently instructed on that point.

It is error to give to the jury conflicting instructions based upon different views of the law applicable to the case, without such instructions being harmonized by the judge.

In an action for damages brought by an employee against his employer, an instruction to the effect that if the employer employed, as fellow-servants with the employee, men of usual competency and prudence in their business, then defendant is not liable for their negligence, and the law does not require the defendant or his foreman to personally supervise such men, but that he has a right to rely upon their discharging their duties with proper care, is misleading, as suggesting that the employer might be justified in neglecting his duties of supervision.

Where, in such case, it is admitted, in an instruction asked by plaintiff, that the plaintiff is without fault or negligence on his part, it is error to admit an instruction asked for by defendant on the question of contributory negligence.

Where, in such an action, the defendant admits that it was the duty of the foreman to see that certain blasting charges had been removed, and to warn plaintiff if they had not, it is error to instruct the jury that it was the duty of plaintiff's co-employees to remove the charges, and that if the foreman undertook to do this, he acted as a fellow-servant of the plaintiff in doing it, and the defendant, therefore, was not responsible for his negligence in the matter.

APPEAL from District Court, Deer Lodge county.

Action to recover damages for personal injuries. The opinion states the facts.

William Scallon and *F. W. Cole*, for appellant.

Hiram Knowles amd *W. W. Dixon*, for respondent.

The opinion of the court was delivered by

MCLEARY, J.—The plaintiff, William Kelley, brought this action against the defendant, the Cable Company, to recover damages in the sum of $30,000 for personal injuries sustained by him while working as a carman in the defendant's mine. There was a trial by jury, and a verdict for the defendant, and, after motion for a new trial overruled, the plaintiff appeals to this court from the judgment and from the order overruling the motion for a new trial. The following facts were admitted by the defendant, as appears from the record herein, to wit: That, at the time stated in the complaint, the defendant was a corporation duly incorporated, and that it was working and managing the mining of the Cable mine in Deer Lodge county, Montana; that on or about the nineteenth day of July 1884, the plaintiff was employed by defendant, and in its service in said mine, as a common laborer, removing ores and dirt, filling the cars with the same, and runing such cars, and that the plaintiff was then and there at work in said mine; and that the plaintiff, at the said time, was ordered by the defendant's foreman, then and there in charge of said mine, and under whose direction and control the plaintiff was bound to work, to go to work in a certain cross-cut in said mine at the work aforesaid; and that the plaintiff, in obedience to such orders, went to work as ordered to do, and while at work therein that he was injured by an explosion; and that said explosion occurred and that plaintiff was injured, without any fault on his part; and that, previous to the explosion, the plaintiff did not know, and had no means of knowing whether or not there were

at said place charges not shot off, and could not have discovered the fact except by being informed thereof.

It appears from the evidence found in the record, that it was the plaintiff's duty to shovel and load into the cars, within the time, the rock and debris blasted by the miners, and to transport the same to the mill and the dump; and further, that the plaintiff worked on the night shift, and the miners who did the blasting worked on the day shift—the plaintiff and others being required to remove, during the night, the ores, etc., which the miners had broken down and blasted during the day; and further, that while the plaintiff was at work during the night of the 19th of July 1884, an explosion occurred in the cross-cut where he was working, which resulted in the plaintiff's receiving very severe injuries, both of his eyes being blown out, and one ear being blown off, his head, face, and neck and chest lacerated, thereby entirely destroying his sight and the hearing of one ear, causing him great and excruciating pain, and confining him to the hospital for several months, and rendering him forever incapable of working at his occupation. The record further discloses the following: That the plaintiff, under orders, went to work at 7 o'clock P. M., one hour after the miners on the day-shift had quit work. The blast had been fired at about 5 o'clock in the afternoon. In accordance with directions, the plaintiff was working at the cross-cut, where he had been working the night before; during the night, between 11 and 2 o'clock, while he was loosening rock and debris with his pick, the explosion took place, and he was hurled eight or ten feet against a car, and was rendered senseless for some time, and injured, as already stated. No warning had been given the plaintiff of any danger existing in the place where he was sent to work, from a "missed charge," or otherwise. On previous occasions he had been warned by the foreman to look out for "missed charges." The foreman, under instructions from the superintendent, had always made it his business to examine, in order to ascertain whether or not all the charges in the blasts had been fired, and when any had missed had been particularly careful to warn the plaintiff and others to look out for these missed charges.

It is a disputed question whether the explosion was caused by a charge of powder left in a hole unexploded, or by a piece of loose powder which had been accidentally dropped or otherwise misplaced among the rocks and debris. In one view of the evidence,

it is possible that the jury may have regarded these injuries as the result of an unavoidable accident, arising from causes over which the defendant had no control, or from dangers which the defendant did not know of, and by the use of reasonable diligence could not have ascertained; and for that reason we do not feel disposed to say that this verdict was contrary to the evidence, or to disturb the judgment on that ground. On this question we are not required to express an opinion.

The admissions of the defendant entirely eliminate all questions of contributory negligence from this case. The defence is based on the theory that the explosion was an unavoidable accident, which could not have been foreseen or prevented by the exercise of ordinary care and prudence on the part of the Cable company, or else was the result of the negligence of some one of the miners, fellow-servants of the plaintiff, or of the foreman while acting in the capacity of a miner and fellow-servant of the plaintiff. The evidence does not bear out the defence that the explosion was caused by the negligence of a fellow-servant. If it was caused by negligence at all, it was the negligence of the foreman, in his capacity as such, and was thus the negligence of the company whom he represented.

We are not called upon to review the instructions given by the court at the request of the plaintiff. If any one of them is erroneous, the appellant is not in a position to complain. But on a casual examination, as modified by the court, and given, they seem to embody the law of the case, and appear to have been correctly given.

Nor can the appellant complain of the fact that "the charge of the court nowhere defines or explains what is ordinary care, and reasonable care or diligence, or the want of it." The only charge given on the subject was asked by the appellant, and he cannot complain of its insufficiency; but if he desired a correct definition given, of the terms referred to, he should have requested an instruction setting out such a definition.

It was not error in the court to modify instruction No. 16, asked by the plaintiff, so as to limit defendant's duty to "ordinary care and diligence," instead of "proper care and diligence," as stated in the instruction. It is true that the court might well have instructed the jury more fully in regard to ordinary care and diligence, and doubtless would have done so had it been so requested.

We believe what was said by this court in a case decided at the last term is applicable to the facts of this case, and it may be quoted in this connection. Mr. Chief Justice WADE, in delivering the opinion of this court, in speaking of "ordinary care," uses the following language: "But this term is relative; and ordinary and reasonable care, which is after all the most that the law requires, means, when used in this connection, that degree of care which prudent men, skilled in the particular business, would be likely to exercise under the circumstances. The care must be proportionate to the danger. What is ordinary care in a case of extraordinary danger would be extraordinary care in a case of ordinary danger, and what would be ordinary care in a case of little danger would be much below this in case of great danger:" *Diamond* v. *Northern Pac. Rd. Co.*, 6 Mont. 590; 13 Pac. Rep. 367.

The principal question presented by this appeal is whether the court erred in giving to the jury the instructions asked by the defendant, to which the plaintiff excepted. The instructions generally asked by the defendant, and given, are in many particulars contradictory to those given at the request of the plaintiff, and in this particular are erroneous. Conflicting instructions must nearly always mislead the jury, and are always good ground for reversal where they have done so. The instructions asked by the different parties to an action generally proceed upon entirely different theories of the law applicable to the case, and they should be so modified and harmonized as to present the law in its proper light, or altogether disregarded, and the case given to the jury on the general charge of the court alone.

The plaintiff in his complaint charges the defendant on account of negligence alleged to have been committed through the acts of the foreman and other agents, and the instructions given at his request proceed upon that theory; but the instructions given at the request of the defendant exclude altogether the idea of the defendant's liability for the negligence of any other agent than the foreman himself. The instructions asked by the plaintiff virtually exclude the defence of the negligence of a fellow-servant from the consideration of the jury; and this view of the matters at issue seem to be borne out by the evidence. Still the instructions asked by the defendant, and given, repeatedly present the acts of a fellow-servant as a perfect defence to the plaintiff's case. Of course, if the evidence warranted it, the defendant should have been given

the benefit of charges of this character; but then the plaintiff's instructions should have been modified accordingly.

The twelfth instruction asked by the defendant reads as follows, to wit: "If the defendant in this case employed as fellow-servants with the plaintiff men of usual prudence and competency in their business (and, in the absence of proof to the contrary, it is presumed that the men defendant employed were such men), then defendant was not liable to plaintiff for the negligence of such fellow-servants, and the law did not require that defendant or its foreman should personally supervise such men, or see that everything they did was carefully or properly done; but defendant had a right to rely upon the expectation that such men would discharge their duties with proper care and prudence, in a skilful manner." Even if the evidence warranted the defence of the negligence being that of a fellow-servant being submitted to the jury, this circumstance stops short of what should have been given to the jury in that connection. The employment of skilful, prudent and sober men discharges the master from any responsibility for injuries caused by their neglect to their fellow-servant; but the master does not have the right, after employing such men, to impose upon them his own duties, and, without supervising them in any way, impute to their negligence any injuries his other servants may sustain, and thus escape responsibility. But such might reasonably be inferred from the charge. It seems that this instruction might readily have misled the jury to the prejudice of the appellant.

Instruction No. 10, given at the request of the defendant, presents as a defence the contributory negligence of the plaintiff. As we understand this case, it was admitted by the defendant that the plaintiff was injured without any fault or negligence on his part. At least it is so stated in the eighth instruction asked by the plaintiff, and given; and, even if it were not so admitted, these two charges could not stand together, as they are contradictory; and to give them both was certainly erroneous.

The fourteenth instruction given at the request of the defendant reads as follows: "If the jury find from the evidence that it was the duty of those who were engaged in blasting at the defendant's mine, and that it is usually the duty of those engaged as laborers in blasting in mines, to determine whether the blasts put in by them have exploded, and that none of them have missed, then, if the foreman undertook to perform this duty, he was a fellow-servant of

the plaintiff as to this matter, in determining whether these blasts had exploded, and none of them had missed, and the defendant was not responsible for any negligence he may have been guilty of in this matter." This instruction is not warranted by the evidence, even if it stated the law correctly. But Savery, the superintendent, and Showers, the foreman, testified that it was the duty of Showers, as foreman, to be particularly careful to see that all the blasts had exploded, and to warn the plaintiff of any missed charges. If the defendant, or its foreman, knew, or by the use of reasonable diligence might have known, of the existence of the danger from this unexploded blast, it was his bounden duty to convey such information to the plaintiff: *Baxter* v. *Roberts*, 44 Cal. 190–193; *Spelman* v. *Fisher Iron Co.*, 56 Barb. 165. These are some of the most familiar principles of law on which this case should have been tried and presented to the jury in the court below. We cannot resist the conclusion that the plaintiff has been prejudiced by the manner in which this case went to the jury; and the importance of the case demands the utmost care in the application of the legal principles by which it should be governed.

For the reason that the instructions given at the request of the plaintiff are inconsistent with those, or some of those, given at the request of the defendant, are not supported by the evidence, nor declaratory of the law applicable to this case, the judgment and order overruling the motion for a new trial are reversed, and the cause remitted to be tried again.

The cases are very numerous in which actions have been brought by servants against their master to recover for injuries suffered by them in the course of their employment, and while the general principles governing the liability of masters in such cases may be well known, it is certainly worth while to consider the subject in respect of certain interesting questions which have arisen in relation thereto. What duty does a master owe to his servant?

I. *Duty of the Master in the Selection of Fellow-Servants.*—The master owes to his servants the duty of exercising due care in the selection of their fellow-servants. It is a general principle of the law that a servant in entering into an employment assumes all the usual and ordinary risks incident to that employment. In the application of this principle, it has been held that a servant can not recover from his master for injuries occasioned by the negligence of a fellow-servant while engaged in the same common employment. This was so decided in 1842, in *Farwell* v. *Boston, &c., Rd.*, 4 Met. (Mass.) 49, which is the leading case on the subject, being followed by a long line of decisions in the courts of this country and of England. Inasmuch as the servant assumes this risk of injury, happening through the negligence of his fellow-servants, it is clearly the duty of the master to exercise due care in the selection of co-servants, or he will be liable to one who is injured in consequence of such neglect. See *McDonald*

v. *Eagle, &c., Manuf. Co.*, 68 Ga. 839 (1882); *Pennsylvania Co.* v. *Roney*, 89 Ind. 453 (1883); *Indiana Mfg. Co.* v. *Millican*, 87 Id. 87 (1882); *Indianapolis, &c., Ry.* v. *Johnson*, 102 Id. 352 (1885); *Bogard* v. *Louisville, &c., Rd.*, 100 Id. 491 (1884); *Hilts* v. *Chicago, &c., Rd.*, 55 Mich. 437 (1885).

The degree of care required in the selection of servants is that which men of ordinary care and prudence exercise. The degree of care required, depends on the nature of the employment. What would be ordinary care and prudence in one case, where the risk and hazard was slight, might be gross negligence in another case where the hazard and responsibility was greater. Hence, regard must always be had to the nature of the employment, in determining whether the master has exercised due care in the selection of his servants: *Michigan Cent. Rd.* v. *Gilbert*, 46 Mich. 176 (1881).

In *Wabash Ry.* v. *McDaniels*, 107 U. S. 454 (1882), it is laid down that what is due care in the selection of servants, depends on the exigency of the particular service, and is such care as in view of the consequences that may result from negligence on the part of employees is fairly commensurate with the perils or dangers likely to be encountered. And see *Hilts* v. *Chicago, &c., Rd., supra.*

In *Turner* v. *City of Indianapolis*, 96 Ind. 51, 56 (1884), the opinion is expressed that the rule applicable to private corporations, such as railroads, &c., that the master is not liable for injuries caused by the negligence of a co-servant, cannot be applied to officers and agents of municipal corporations, and that if in any case the rule can be made applicable to such officers and agents, that it cannot be made to apply when they are acting in entirely different departments of the municipal government.

(*a.*) If a servant is injured by the negligence of an incompetent co-servant, the master will not be liable provided the injured servant knew of the incompetency of the fellow-servant and thereafter continued in the employment: *Stafford* v. *Chicago, &c., Rd.*, 114 Ill. 244 (1885); *Missouri Furnace Co.* v. *Abend*, 107 Id. 44 (1883); *Lake Shore, &c., Ry.* v. *Stupak*, 108 Ind. 1 (1886).

(*b*) In *United States Rolling Stock Co.* v. *Wilder*, 116 Ill. 100 (1886), the principle is declared that one entering service is not bound to investigate and find out at his peril whether the common master has exercised proper care in the selection of those already employed in the same branch of the business, but that he has a right to assume that this duty has been discharged until notice to the contrary has been brought home to him. "All that the law demands of one thus employed is, that he keep his eyes open to what is passing before him and avail himself of such information as he may receive with respect to the habits and characteristics of his fellow-servants, and if, from either of these sources of information, he finds one of them, from incompetency or other cause, renders his own position extra hazardous, it is his duty to notify the master, and if the latter refuses to discharge the incompetent or otherwise unfit fellow-servant, the complaining servant will have no alternative but to quit the master's employ. If he does not, he will be deemed to have assumed the extra hazard of his position thus occasioned."

(*c.*) The definition of fellow-servants is a question of law, but it is always a question of fact to be determined by the jury from the evidence, whether the particular case falls within the definition: *Chicago, &c., Rd.* v. *Moranda*, 108 Ill. 576, 581 (1884); *Indianapolis, &c., Rd.* v. *Morgenstern*, 106 Id. 216 (1883).

(*d.*) The Supreme Court of Illinois thus defines fellow-servants: "In order to constitute servants of the same master 'fellow-servants,' within the rule *respondeat superior*, it is not enough they are engaged in doing parts of some work, or in the promotion of some enterprise

carried on by the master, not requiring co-operation, nor bringing the servants together or into such personal relations that they can exercise an influence upon each other, promotive of proper caution in respect of their mutual safety, but it is essential that they shall be, at the time of the injury, directly co-operating with each other in the particular business in hand, or that their usual duties shall bring them into habitual consociation, so that they may exercise an influence upon each other, promotive of proper caution." *Indianapolis, &c. Rd.* v. *Morgenstern*, 106 Ill. 216 (1883); *Chicago, &c., Rd.*, v. *Moranda*, 108 Id. 576 (1884).

In *Smith* v. *Oxford Iron Co.*, 42 N. J. L. 468 (1880), it is said that to constitute persons fellow-servants, they need not be engaged in the same place or in the same particular work, but that it is sufficient if they are in the service of the same master, engaged in the same common work and acting for the accomplishment of the same common purpose. That to exempt the master, the servant to whose negligence the injury is to be attributed, need not be on a parity of service with the party injured, nor be engaged in the same particular work.

In *McAndrews* v. *Burns*, 39 N. J. L. 120 (1876), a fellow-servant is said to be any one who serves and is controlled by the same master. That common employment is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow-servants, it may probably expose them to injury.

For instances of recent cases where persons have been held not to be fellow-servants, see *Burlington, &c., Rd.* v. *Crockett*, 19 Neb. 138 (1886); *Smith* v. *S. C. & P. Rd.*, 15 Id. 585 (1884); *Madden* v. *Railroad Co.*, 28 W. Va. 610 (1886); *St. Louis, &c., Rd.* v. *Weaver*, 35 Kans. 412 (1886); *Chicago, &c., Rd.* v. *Ross*, 112 U. S. 377 (1884); *Mann* v. *Oriental Print Works*, 11 R. I. 152 (1875); *McDonald* v. *Eagle, &c., Mfg. Co.*, 68 Ga. 839 (1882).

II. *Duty of the Master as to Machinery and Appliances.*—The master is not an insurer of the lives of his servants, and does not engage that the machinery and appliances which he puts into their hands for the performance of the work shall be absolutely safe and free from defects: *St. Louis, &c., Rd.* v. *Weaver*, 35 Kans. 412 (1886); *Murphy* v. *Crossan*, 98 Penn. St. 495 (1881); *Green, &c., Pass. Ry.* v. *Bresmer*, 97 Penn. St. 103 (1881).

He does not owe them the duty of furnishing the newest and best machinery which can be obtained: *Philadelphia, &c., Rd.* v. *Keenan*, 103 Pa. St. 124 (1883); *Payne* v. *Rcese*, 100 Id. 301 (1882); *Marsh* v. *Chickering*, 101 N. Y. 396 (1886); *Burns* v. *Chicago, &c., Rd.*, 69 Iowa 450 (1886); *Berns* v. *Coal Co.*, 27 W. Va. 285 (1885); *Schall* v. *Cole*, 107 Pa. St. 1 (1884); *Michigan Cent. Rd.* v. *Smithson*, 45 Mich. 212 (1881). But he does owe them the duty of exercising reasonable care in providing machinery and appliances that are suitable and reasonably safe. It is his duty to furnish his servants such appliances as can, with reasonable care, be used by them without danger: *Berns* v. *Coal Co.*, *supra*; *Pittsburgh, &c., Rd.* v. *Sentmeyer*, 92 Pa. St. 276 (1879); *Nordyke, &c., Co.* v. *Van Sant*, 99 Ind. 188 (1884); *Gates* v. *Southern Minnesota Rd.* 28 Minn. 110 (1881); *Fay* v. *Minneapolis, &c., Rd.*, 30 Id. 231 (1883); and the servant has a right to rely on the safety and sufficiency of the appliances provided for the accomplishment of the work, unless their defectiveness is so apparent as to be open to the observation of prudent men: *Bradbury* v. *Goodwin*, 108 Ind. 286 (1886).

In *Stringham* v. *Stewart*, 100 N. Y. 516 (1885), it is decided that where the master has furnished a dangerous and defective machine, he is not excused from liability for an injury to his servant

which would not have happened had the machine been safe and suitable, by the fact that the negligence of a fellow-servant co-operated in producing the injury.

This duty of a master to furnish safe machinery and appliances makes it obligatory on a railroad company to exercise due care and diligence in seeing that the cars of other companies, which it allows to come into its yards and be handled by its employees, are reasonably safe to be so handled, and it has been held that the company cannot divest itself of this duty to its servants for their safety and protection by a contract with such other companies whose cars are used that the latter shall keep them in repair: *Chicago, &c., Rd.* v. *Avery*, 109 Ill. 314 (1884).

A railroad company, so far as its duty to its servants is concerned, must exercise reasonable and ordinary care and diligence to make its road safe, whether it constructs, purchases or leases it: *St. Louis, &c., Rd.* v. *Weaver*, 35 Kans. 412 (1886).

(*a.*) The obligations of the master are not discharged when he has taken care to provide safe machinery and appliances, but it is his duty to see that such machinery and appliances continue to be safe and suitable. In *Baker* v. *Allegheny Valley Rd.*, 95 Pa. St. 211, 215 (1880), it is said that the master owes to his servant the duty of providing safe tools and machinery, and that having done this he does not engage that they will always continue in the same condition. That he would not be liable for any defect which would become apparent in their use, it being the duty of the servant to observe and report such defect, he having the means of discovering it not possessed by the master. But the court held that this principle did not apply in the case of such appliances as the master was bound to know could only last for a limited time, it being his duty to renew such appliances at proper intervals. The action in this case was brought for an injury inflicted on the servant by the breaking of a guy-rope of a derrick. "The master is bound to know that a rope, under such circumstances, will only last a limited time. It will not do for him to furnish a sound rope and then fold his arms until by accidentally breaking it is demonstrated to be insecure." Having provided reasonably safe machinery and appliances, that it is his duty to use reasonable diligence to keep them in that condition, see *Tierney* v. *Minneapolis, &c., Rd.*, 33 Minn. 311 (1885); *Indiana Car Co.* v. *Parker*, 100 Ind. 181 (1884); *Madden* v. *Minneanapolis, &c., Rd.*, 32 Minn. 303

(*b.*) The master is not liable for injuries resulting from a defect which could not be discovered by careful inspection or the application of appropriate tests: *Probst* v. *Delamater*, 100 N. Y. 266 (1885).

But in all cases the master is bound to disclose to the servant latent defects and dangers of which he has knowledge, or of which he ought to have knowledge by the exercise of reasonable care and diligence, and of which the servant has no knowledge, and which he would not discover by the exercise of reasonable care: *Pittsburgh, &c., Ry.* v. *Adams*, 105 Ind. 151 (1885).

(*c.*) And in general the master is not liable for injuries to servants resulting, from defective machinery and appliances in cases where the servant knew of the defect, and notwithstanding it continued in the service. He thereby voluntarily assumes the risk and relieves the master from liability: *Central Rd.* v. *Haslett*, 74 Ga. 59 (1884); *Bell* v. *Western, &c., Rd.*, 70 Ga. 566 (1883); *Mansfield Coal Co.* v. *McEnery*, 91 Pa. St. 185 (1879); 101 *Sweeney* v. *Berlin, &c., Envelope Co.*, N. Y. 520 (1886); *Marsh* v. *Chickering*, Id. 396 (1886); *Toull* v. *Sioux City, &c., Rd.*, 66 Iowa 346 (1885); *Heath* v. *Whitebreast Coal & Mining Co.*, 65 Iowa 737 (1885); *Wells* v. *B. C. R., &c., Rd.*, 56 Id. 520 (1881); *Schall* v. *Cole*, 107 Pa. St. 1 (1884); *Michigan Central Rd.* v. *Smithson*, 45 Mich. 212 (1881).

(*d*) But it has been held that a servant does not assume the risk of using unsafe machinery because he knows of the defect, unless he also understands or ought to understand the risks incurred in using it: *Russell* v. *Minneapolis, &c., Rd.*, 32 Minn. 231 (1884); and even though the servant knew of the defect and of the danger, and continued in the service, yet may he recover if he had reasonable grounds to believe that the master had remedied the defect or would immediately remedy the same: *Berns* v. *Coal Co.*, 27 W. Va. 285 (1885); *Greene* v. *Minneapolis, &c., Rd.*, 31 Minn. 248 (1883).

In *Sioux City, &c., Rd.* v. *Finlayson*, 16 Neb. 578 (1884), an action was brought by an engineer to recover for an injury caused by an explosion of an engine on which he was employed. He had, some time prior to the accident, observed certain evidences of weakness in the locomotive, and had called the attention of the proper authorities thereto. They made an examination of it,—concluded that there was no immediate danger, and instructed him to continue using it until they could effect an exchange, and cause the necessary repairs to be made. The court stated the rule in this case as follows: "If the defective machinery, though dangerous, is not of such a character that it may not be reasonably used by the exercise of care, skill and diligence, the servant does not assume the risk. If the servant, in obedience to the requirement of the master, makes use of machinery which, though dangerous, is not so much so as to threaten immediate injury, or when it is reasonably probable it may be safely used by extraordinary caution or skill, the master would be liable for a resulting accident."

(*e.*) Whether the machinery and appliances furnished by the master are reasonably safe and suitable is a question for the jury to decide: *Philadelphia, &c., Rd.* v. *Keenan*, 103 Pa. St. 124

III. *Duty of the Master as to Place.*—The master also owes to the servant the duty of providing a suitable place in which the servant can do his work without exposure to dangers that do not ordinarily come within the obvious scope of such employment as is usually carried on: *Swoboda* v. *Ward*, 40 Mich. 423 (1879).

The machinery and appliances not being defective, the question has sometimes been raised, whether the duty which the master is under to furnish a safe place in which the servant may work, does not oblige the master to fence the machinery, if by neglect to do so the place is made unsafe. This matter was considered in *Sullivan* v. *India Manuf. Co.*, 113 Mass. 396 (1873), and it was said that if the danger is apparent from the failure to fence or cover the machinery, and the servant has sufficient knowledge and capacity to comprehend the danger, he can not complain that the place might have been made safer by such fence or covering, and that the master would not be liable for his neglect to do so. Having assented to occupy the place, the servant assumes the risk. See *Rock* v. *Indian Orchard Mills*, 142 Mass. 528 (1886); *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572 (1869).

In *Cook* v. *St. Paul, &c., Rd.*, 34 Minn. 45 (1885), the plaintiff brought an action to recover for an injury caused by the giving way of a floor on which he was working at moving the ashes and debris, the building having been partially destroyed by fire. He was allowed to recover. "The master's duty and liability to his servant," the court say, "extend not only to such unnecessary and unreasonable risks as are in fact known to him, but to such as he ought to know in the exercise of proper diligence, *i. e.*, diligence proportionate to the occasion."

In *Armour* v. *Hahn*, 111 U. S. 313 (1884), it is announced that the obligation of a master to provide reasonably

safe places and structures for his servants to work upon, does not oblige him to keep a building which they are employed in erecting in a safe condition at every moment of their work, so far as its safety depends on the due performance of that work by them and their fellow-servants.

IV. *Duty of the Master in the case of Inexperienced Servants.*—It is the duty of the master not to expose inexperienced servants, at whose hands he requires a dangerous service, without giving them warning of the danger, and such instructions as will enable them to avoid injury: *Rock* v. *Indian Orchard Mills*, 142 Mass. 528 (1886); *Atlas Engine Works* v. *Randall*, 100 Ind. 293 (1884); *Jones* v. *Florence Mining Co.*, 66 Wis. 268; *Larson* v. *Berquinst*, 34 Kans. 334 (1885); *Augusta Factory* v. *Barnes*, 72 Ga. 217, 228; *Sullivan* v. *Indian Manuf. Co.*, 113 Mass. 396, 398 (1873); *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 596 (1869). In *Hickey* v. *Taaffe*, 35 Albany Law Journal 354 (1887), the New York Court of Appeals declares that in putting a person of immature years at work upon machinery which is in some respects dangerous, an employer is bound to give the employee such instructions as will cause him to fully understand and appreciate the difficulties and dangers of his position and the necessity there is for the exercise of care and caution, and that merely going through the form of giving instructions, even if such form included everything requisite to a proper discharge of his duties by such employee, would not be sufficient, as such person must understand in fact the dangerous character of the machinery, and be able to appreciate such dangers and the consequences of a want of care. That if a person is so young, that after full instructions he wholly fails to understand them, he is too young for such employment, and the employer puts him at work at his own risk. If no such instruction has been given it will be sufficient, if prior to the accident the servant has acquired such knowledge and information from practical experience, which is "the best of all teachers." And, in general, a servant should never be exposed to unusual dangers, of which he is ignorant, without giving him notice thereof.

In *Smith* v. *Oxford Iron Co.*, 42 N. J. L. 467 (1880), the defendant was held liable to a servant in its employ, injured in using giant powder, a highly dangerous explosive. The plaintiff was employed as a miner, and at the time he entered the service the ordinary blasting powder was used, the use of the giant powder, which was a more dangerous explosive, being subsequently introduced. The court held, that before allowing this new compound to be introduced, the company owed to its servants the duty of ascertaining and making known to them its properties and the mode of using it. "It was gross negligence in the company to furnish such an article for a laborer's use without giving him the requisite information. Whether the company was aware of its dangerous quality, or furnished it for use without having taken steps to obtain such knowledge, it is equally liable. It was a duty which the company, through Scranton, was bound to perform, to see that such reasonable care as the exigency of the case demanded was taken, and to impart to the subordinates full information as to the manner of applying the new compound, before placing it in the hands of an ignorant laborer."

V. *Delegation of the Master's Duty to a Third Person.*—The decision in *Rogers* v. *Tualow Manuf. Company*, 35 Albany Law Jour. 410, (1887), shows the law in Massachusetts to be that the master "cannot wholly escape responsibility" for the condition of the machinery and appliances used in his business, by delegating to servants the duty of keeping them in repair; "that the negligence of his servants in repairing, or in failing to

repair, machinery is not necessarily the negligence of the master, but that it is also to be determined in each case, whether the master has exercised a reasonable supervision over his servants, and reasonable care in seeing that his machinery is kept in proper condition, although he may have employed competent servants, and furnished them with suitable materials, and instructed them to keep the machinery in repair." This, the Massachusetts court admits, "is perhaps not precisely the law as it is generally declared in the United States."

And the rule as it is generally declared in the United States is, that a master cannot escape liability by delegating to a third person the performance of a duty which he owes to his servants. On the contrary, the person to whom he delegates such responsibility represents the master himself, and his negligence in respect to the duty so imposed is the negligence of the master and not of a fellow-servant: *Kelly* v. *Erie Telegraph Co.*, 34 Minn. 321 (1885); *Drymala* v. *Thompson*, 26 Minn. 40 (1879); *Mulvey* v. *R. I. Locomotive Works*, 14 R. I. 204 (1883); *Riley* v. *Rd.*, 27 W. Va. 145 (1885); *Capper* v. *Louisville, &c., Ry.*, 103 Ind. 305 (1885); *Indiana Car Co.* v. *Parker*, 100 Ind. 181 (1884); *Benzing* v. *Steinway*, 101 N. Y. 547 (1886); *Chicago, &c., Rd.* v. *Avery*, 109 Ill. 314 (1884); *Northern Pacific Rd.* v. *Herbert*, 116 U. S. 642 (1885).

VI. *The Burden of Proof.*—If the injured servant alleges that his injury is due to the negligence of the master in the selection of incompetent fellow-servants, or in failing to provide machinery and appliances that were reasonably safe, or to keep the premises in a safe condition, the burden is on him to prove such negligence on the master's part: *Pittsburgh, &c., Rd.* v. *Adams*, 105 Ind. 151 (1885); *Fraker* v. *St. Paul, &c., Rd.*, 32 Minn. 54 (1884); *Stafford* v. *Chicago, &c., Rd.*, 114 Ill. 244 (1885).

HENRY WADE ROGERS.

Court of Appeals of Maryland.

LAMB v. STATE.

The criminal law should be clear and should not be extended by deductions.

While attempts to commit both felonies and misdemeanors are misdemeanors, and indictable as such, when the attempt consists of nothing but a bare solicitation, it is not indictable, if the substantive crime is but a misdemeanor.

The rule of the common law has not been altered by the Act of 1868, providing for the crime of abortion: and an indictment charging the solicitation of a pregnant woman to take drugs for the purpose of procuring abortion, is not within the terms of that Act.

WRIT OF ERROR to the Circuit Court for Baltimore county.

Indictment and conviction for a solicitation to take certain drugs for the purpose of causing a miscarriage and abortion.

The indictment contained two counts, as follows:

Indictment.—State of Maryland, Baltimore County, to wit:

The jurors of the state of Maryland for the body of Baltimore county, do on their oath present, that John C. Lamb, late of Baltimore county aforesaid, on the first day of April, in the year of